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RE WONG CHONG SIONG, EX P ARAB MALAYSIAN FINANCE BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[WINDING-UP PETITION NO: 29-416-1995]
b 7 NOVEMBER 1998

BANKRUPTCY: *Petition - Striking out - Whether petition could be struck out before it was served on judgment debtor - Whether petition should have been dismissed - Whether adjournment should have been granted to petitioning* c *creditor to effect service - Bankruptcy Act 1967, s. 91(1) - Bankruptcy Rules 1969, r. 127*

BANKRUPTCY: *Petition - Deposit - Money deposited by petitioning creditor with Official Assignee - Whether can be forfeited - Duty of Official Assignee to account for deposits – Bankruptcy Rules 1969, r. 103(3)*

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This was an appeal by the judgment creditor ('the creditor') against the decision of the Senior Assistant Registrar ('the SAR') in striking out its petition before it was served on the judgment debtor ('the debtor'), and in ordering the forfeiture of the deposit made by the creditor with the Official Assignee e ('the OA'). The issue for determination was whether the SAR had the jurisdiction to make the aforesaid orders.

Held:

[1] The striking out of the petition before it was served on the debtor was f incompatible with "doing complete justice" as envisaged by s. 91(1) of the Bankruptcy Act 1967. The process server was unable to serve the petition on the debtor personally, and the creditor had applied for an order of substituted service. At the time the SAR struck out the petition, the application for substituted service had neither been approved nor g dismissed by the court.

[1a] The SAR had no jurisdiction to dismiss the petition under r. 127 of the Bankruptcy Rules 1969 as the petition had not been duly served on the debtor as required by the said rule. The SAR had also erred in refusing to grant an adjournment to the creditor to enable it to serve the petition h on the debtor.

[2] The SAR had no jurisdiction to forfeit the deposit. It is the OA who shall account and be responsible to the creditor for the deposit (Bankruptcy Rules 1969 r. 103(3)).

i *[Appeal allowed; orders of SAR set aside; petition reinstated.]*

Cases referred to:
Beswick v. Beswick [1968] AC 58 ***(refd)***
Chan Tai Tai & Anor v. Official Assignee, FM [1957] 23 MLJ 54 ***(refd)***
Corporation of Madras v. Electric Tramways Ltd [1931] AIR Mad 152 ***(refd)***
Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 ***(refd)***
Goodwin v. Phillips [1908] 7 CLR 1 ***(refd)***
PP v. Chew Siew Luan [1982] 1 CLJ 354 ***(refd)***
PP v. Chu Beow Hin [1982] 1 CLJ 110 ***(refd)***
Re Dato' Mohamed Pilus Yusoh, ex p Southern Bank Bhd [1988] 1 CLJ 102 ***(refd)***
Smith Kline & French Laboratories Ltd v. Salim (Malaysia) Sdn Bhd [1989] 2 CLJ 228 ***(refd)***
Quebec Railway, Light, Heat and Power Co Ltd v. Vandry [1920] AC 662 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 91(1)
Bankruptcy Rules 1921, r. 88(b)
Bankruptcy Rules 1969, rr. 89(b), 103(1), (3), 127
Rules of the High Court 1980, O. 56 r. 1(3), O. 92 r. 4

For the judgment creditor - Norlita Mohd Tahir; M/s Shahinuddin & Ranjit

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

This was an appeal by Arab Malaysian Finance Berhad, the judgment creditor, in encl. 38 against the decision of the Senior Assistant Registrar ("SAR") who on 6 March 1998 ordered that the judgment creditor's petition dated 18 Febraury 1997 filed by the judgment creditor and before it was served on Wong Chong Siong, the judgment debtor, be struck out. The SAR too ordered the forfeiture of the deposit in the sum of RM2,000 which had been deposited by the judgment creditor to the Official Assignee ("OA").

It is pertinent to point out that the judgment creditor had acted expeditiously for they filed the notice of appeal to the judge-in-chambers in encl. 38 on 30 July 1998 within two days from the date when the sealed Order as reflected in encl. 38 was returned to the judgment creditor's solicitors by the court on 28 July 1998. Now, an appeal to the judge-in-chambers, like encl. 38, shall lie from any judgment, order or decision of the SAR and the time frame of such an appeal according to O. 56 r. 1(3) of the Rules of the High Court 1980 ("RHC") would be as follows:

> Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

But the appeal to the judge-in-chambers in encl. 38 related to a special provision namely the Bankruptcy Rules 1969 and of significance would be r. 89(b) thereof which stipulates that:

> The provisions and procedure for the time being in force respecting appeals from the High Court in its ordinary civil jurisdiction shall apply to appeals in bankruptcy with the following modifications:
>
> (a) ...
>
> (b) The time for entering the appeal and serving notice thereof on the respondent shall be fourteen days from the date of the signing, entering or otherwise perfecting the judgment or order appealed from;
>
> (c) ...

That the judgment creditor had complied fully with r. 89(b) of the Bankruptcy Rules 1969 can never be doubted. In my judgment, for the purpose of computing time for filing the appeal in encl. 38 the judgment creditor must adhere to r. 89(b) of the Bankruptcy Rules 1969 and not O. 56 r. 1(3) of the RHC. I am fortified in my view by the judgment of Buhagiar J in *Chan Tai Tai & Anor v. Official Assignee, F.M.* [1957] 23 MLJ 54 where his Lordship said in the context of r. 88(b) of the Bankruptcy Rules 1921 which is equivalent to the present r. 89(b) of the Bankruptcy Rules 1969:

> On behalf of the applicant it was submitted that there is a conflict between Rule 88 (b) of the Bankruptcy Rules 1921, and Rule 11 of the Court of Appeal Rules and that in view of the provisions of section 10(2) of the Rule Committee Ordinance, 1948, under which the Court of Appeal Rules were made, the provisions of those Rules should prevail.
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> In the opinion of this Court there is no conflict between the Court of Appeal Rules and Bankruptcy Rules, 1921; Rule 88 of the last mentioned Rules contains general and special provisions; after laying down that the provisions and procedure for the time being in force respecting appeals from the Supreme Court in its ordinary civil jurisdiction shall apply to appeals in bankruptcy, that Rule goes on to make certain modifications, one of which is that in appeals in bankruptcy the time for entering the appeal and serving notice thereof on the respondent is to be fourteen days from the date of signing, entering or otherwise perfecting the judgment or order appealed from instead of one month. It is an established principle that unless it is specifically so provided by law, a general provision does not impliedly override a special provision.

The maxim *generalibus specialia derogant* is a popular terminology for interpretation and it has been used by judges in commonwealth countries. Reference to some of these judgments would be fruitful. Thus, Griffiths CJ in *Goodwin v. Phillips* [1908] 7 CLR 1 said at p. 7 of the report:

> .... where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

In *Public Prosecutor v. Chew Siew Luan* [1982] 1 CLJ 354; [1982] 2 MLJ 119, Raja Azlan Shah CJ Malaya (as His Majesty then was) said:

> *Generalibus specialia derogant* is a cardinal principle on interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

Earlier on in the same vein, his Lordship Raja Azlan Shah Acting LP (as His Majesty then was) said in *Public Prosecutor v. Chu Beow Hin* [1982] 1 MLJ 135, 137:

> Where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law – *generalibus specialia derogant.*

Finally, Reilly J in *Corporation of Madras v. Electric Tramways Ltd* [1931] AIR Mad 152 said:

> There is the old maxim *generalia specialibus non derogant*; that is general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act.
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> If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act, as an exception to the general Act. These propositions appear to me to be beyond discussion at the present day.

Without a doubt applying that maxim, the Bankruptcy Rules 1969 takes precedence over the RHC.

Only two issues, for the very first time, had to be considered. They may be phrased as follows:

(1) Whether the SAR has the jurisdiction in a bankruptcy proceeding to strike out the judgment creditor's petition before it has been duly served on the judgment debtor?

(2) Whether the SAR has the necessary jurisdiction to forfeit the deposit of RM2,000 which had been deposited by the judgment creditor for the OA?

The First Issue

Section 91(1) of the Bankruptcy Act 1967 provides as follows:

> 91. (1) Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

and the root words would be "for the purpose of doing complete justice." Would striking out the judgment creditor's petition before it has been duly served on the judgment debtor be said to be "doing complete justice"? Justice must necessarily be for two parties – the judgment creditor and the judgment debtor. A procedural impropriety in the decision making process of the SAR cannot be condoned by this court. It seems to me that the key to the solution of the problem would be to interpret s. 91(1) of the Bankruptcy Act 1967. There is no room for the SAR to manoeuvre around that section and say that he is empowered to strike out the judgment creditor's petition before service was effected on the judgment debtor. Lord Reid in *Beswick v. Beswick* [1968] AC 58 spoke of construing an Act of Parliament in this way (see p. 73 of the report):

> In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there.

In giving effect to the words of s. 91(1) of the Bankruptcy Act 1967, every effort must not be spared in giving effect to all the words thereto because "the legislature is deemed not to waste its words" or that the legislature will "say anything in vain" (Lord Sumner in *Quebec Railway, Light, Heat and Power Co Ltd v. Vandry* [1920] AC 662). Abdoolcader SCJ in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] 2 MLJ 35, aptly said:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ... .

In 1989, VC George J (as he then was) in *Smith Kline & French Laboratories Ltd v. Salim (Malaysia) Sdn Bhd* [1989] 2 CLJ 228; [1989] 2 MLJ 380 had this to say:

> It is trite that as far as possible a statute should not be read to give it an effect such that it is a pointless piece of legislation.

I too would not treat s. 91(1) of the Bankruptcy Act 1967 as a worthless piece of legislation. In giving effect to it, I hold and it was my judgment that the SAR blundered when he struck out the judgment creditor's petition before it was served on the judgment debtor. The process server failed in his attempt to serve the judgment creditor's petition on the judgment debtor personally. This prompted the judgment creditor to file an application by way of a summons in chambers on 19 August 1997 for substituted service supported by an affidavit. When the SAR struck off the judgment creditor's petition on 6 March 1998, the application for substituted service had not been "formalised" by the court. The practice of the bankruptcy court in Johor Bahru is this: When an application for an order of substituted service either for bankruptcy notice or for judgment creditor's petition is submitted to the court for approval, a copy of the said application will be returned to the solicitors for the judgment creditor with the draft order duly approved or dismissed. Unfortunately, until 6 March 1998 the application for substituted service had not been approved and neither was it dismissed by the court. In fact, it was deposed that the copy of the application for substituted service together with the draft order had not been returned to the judgment creditor. It was for these reasons that the judgment creditor was unable to serve the judgment creditor's petition to the judgment debtor by way of substituted service. In my judgment, the decision making process of the SAR was flawed procedurally and it must be set aside *in limine*.

The Second Issue

Rule 103 of the Bankruptcy Rules 1969 states as follows:

> 103. (1) Upon the presentation of a petition the petitioner shall deposit with the Official Assignee a sum of one thousand five hundred ringgit if a debtor, and two thousand ringgit if a creditor and such further sum as may from time to time be required by the Official Assignee to cover fees and expenses.

(2) No petition shall be received unless the receipt of the Official Assignee for the deposit is produced to the Registrar.

(3) The Official Assignee shall account to the creditor, or, as the case may be, to the debtor's estate for the sums deposited and any money deposited by a petitioning creditor shall, unless it is required by reason of insufficiency of assets for the payment of fees and expenses incurred by the Official Assignee, be repaid to him out of the proceeds of the estate in the order of priority prescribed by these Rules.

(4) The costs of publishing any order or notice under these Rules in the Gazette or a newspaper shall be disbursed out of the money deposited under paragraph (1).

and clearly the sum of RM2,000 was meant to cover the fees and expenses of the OA and of significance is the fact that no petition shall be received by the court unless the receipt of the OA for that deposit is produced and shown to the SAR. It is the duty of the OA to account to the judgment creditor or for that matter to the judgment debtor's estate, as the case may be, for the sums deposited as stated in r. 103(1) thereof. Any money deposited by the petitioning creditor shall, unless it is required by reason of insufficiency of assets for the payment of fees and expenses incurred by the OA, be repaid to him from the proceeds of the estate in the order of priority prescribed and determined by the Bankruptcy Rules 1969. In my judgment, the SAR has no judicial power to forfeit the deposit sum of RM2,000 paid by the judgment creditor to the OA upon presentation of the petition for winding-up. It is the OA who shall account and be responsible to the judgment creditor for that deposit.

It is interesting to note that r. 127 of the Bankruptcy Rules 1969 states that no further adjournment of the hearing shall be allowed after the expiration of one month from the date of the first hearing of the petition unless the judgment debtor intends to show cause to the contrary against the petition. Obviously r. 127 of the Bankruptcy Rules, 1969 empowers the court to either make a receiving order or dismiss the petition forthwith. A proviso exists and it is this: "provided such petition shall have been duly served" and by necessity it must mean duly served to the judgment debtor. In the event the petition has not been duly served to the judgment debtor, r. 127 of the Bankruptcy Rules 1969 will not apply. Factually speaking, the judgment creditor's petition in the present appeal has not been duly served onto the judgment debtor. In fact, the draft order for the substituted service of the judgment creditor's petition has not been approved by the court. That being the case, r. 127 of the Bankruptcy Rules 1969 cannot be invoked in the present appeal and consequently the SAR was bereft of any judicial authority to dismiss the judgment creditor's petition. For curiosity, r. 127 of the Bankruptcy Rules, 1969 is now reproduced *verbatim*:

127. After the expiration of one month from the day appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed unless the debtor has given prior notice that he intends to show cause against the petition; but in every such case unless an order for adjournment is made the Court shall either make a receiving order or dismiss the petition.

Re Dato' Mohamed Pilus bin Yusoh, Ex parte Southern Bank Bhd [1988] 1 MLJ 536 was a case where the judgment creditor's petition had been duly served on the judgment debtor and the first hearing of the judgment creditor's petition was fixed after the petition was duly served. In sharp contrast would be the present appeal where the judgment creditor's petition had not been served on the judgment debtor. In *Re Dato' Mohamed Pilus bin Yusoh, Ex parte Southern Bank Bhd (supra)*, the adjournment for the fourth time was refused by the court and the court then dismissed the petition. This was what Peh Swee Chin J (as he then was) said at p. 538 of the judgment:

> In the circumstances, the court did not think that the refusal of the adjournment on 30 June 1987 would result in any injustice to the debtor; on the contrary, the court considered that it might cause an injustice to the petitioning creditor if a fourth adjournment was granted, and that as no cause in any event had been shown to the satisfaction of the court against the petition, the court was obliged to make the orders complained of.

Earlier on at p. 537 of the judgment, his Lordship Peh Swee Chin J (as he then was) had this to say of r. 127 of the Bankruptcy Rules 1969:

> By rule 127, the court's discretion is to be exercised according to its tenor. It appears that the adjournment of a petition is up to the court up to the end of one month after a petition first comes up for hearing (after service before such first hearing). After the end of the said month, there would be no adjournment by consent unless the debtor has given prior notice of his intention to show cause against the petition, and in the absence of such prior notice, the court shall either make a receiving order or dismiss the petition. The dismissal of the petition should ordinarily be a result of due cause against the petition having been shown to the satisfaction of the court.

Obviously the SAR erred in law when he dismissed the judgment creditor's petition before it was duly and successful served on the judgment debtor and to make matters worse, without any due cause. The SAR too erred when he refused to grant an adjournment to the judgment creditor to enable the judgment creditor to serve the petition to the judgment debtor. In my judgment, the refusal of the SAR to grant an adjournment and instead chose a course of action that went against the law by dismissing the judgment creditor's petition was an exercise of judicial excessiveness. It had, in the final analysis, caused an injustice to the judgment creditor.

Order 92(1) of the Bankruptcy Act 1967 would certainly enable me to "review, rescind or vary any order made by it under its bankruptcy jurisdiction." To add leverage to that would be O. 92 r. 4 of the RHC which states as follows:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In breaking new ground, I have been very cautious in my approach. This judgment would show that the SAR had contravened s. 91(1) of the Bankruptcy Act 1967 and what he did was *ultra vires* rr. 103 (3) and 127 of the Bankruptcy Rules 1969. There were no provisions in the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 to allow the SAR to forfeit the deposit of RM2,000 held and kept by the OA as trustees. For these reasons, the appeal was allowed. The judgment creditor's petition dated 18 February 1997 to be re-instated. The order of forfeiture of the deposit sum of RM2,000 to be set aside and that deposit to remain with the OA. The hearing of the judgment creditor's petition to be heard on 12 December 1998 before the SAR.